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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

DANIEL SMALL, CAROLYN SMALL,
WILLIAM CURTIN, DAVID COHEN,
LANETTE LAWRENCE and LOUISE
COLLARD, Individually and on Behalf of
All Other Persons Similarly Situated,

Plaintiffs,

v.

UNIVERSITY MEDICAL CENTER OF
SOUTHERN NEVADA, a political
subdivision of Clark County, State of Nevada,
CLARK COUNTY, a political subdivision of
the State of Nevada, and JOHN ESPINOZA,
an individual,

Defendants.

CASE NO. 2:13-cv-00298-APG-PAL

**JOINT MOTION FOR APPROVAL OF
COLLECTIVE ACTION SETTLEMENT
AGREEMENT**

DATE: May 29, 2019

TIME: 2:00 PM

JUDGE: ANDREW P. GORDON

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1 Plaintiffs Daniel Small, Carolyn Small, William Curtin, David Cohen, Lanette Lawrence, and
 2 Louise Collard, individually and on behalf of all other similarly situated employees (collectively
 3 "Plaintiffs") and Defendant University Medical Center of Southern Nevada, its subsidiaries and
 4 affiliates, Defendant Clark County, Nevada, its subsidiaries and affiliates, and Defendant John
 5 Espinoza (collectively "Defendants" or "UMC") (Plaintiffs and Defendants are referred to herein
 6 collectively as "the Parties"), by and through their attorneys of record, have reached a settlement
 7 ("Settlement") of this Fair Labor Standards Act ("FLSA") collective action. As set forth below, the
 8 Parties' Settlement is fair and reasonable and was reached as a result of contested litigation to resolve
 9 *bona fide* disputes between them. Accordingly, the Parties seek an Order from the Court approving
 10 the Parties' Stipulation of Settlement and Release ("Settlement Agreement"), attached hereto as
 11 Exhibit A, and dismissal of this action with prejudice. This Motion is based on the following
 12 Memorandum of Points and Authorities, all exhibits attached hereto, and any oral argument this
 13 Court may order.
 14
 15

16
 17 Dated: May 13, 2019

GLANCY PRONGAY & MURRAY LLP

18 By: /s/Marc L. Godino

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Settlement represents a reasonable compromise of *bona fide* disputes, including entitlement to alleged unpaid overtime to hundreds of Defendants’ current and former employees, as well as satisfaction of the sanctions order signed by Magistrate Judge Peggy Leen on August 9, 2018 (“Sanctions Order”)(ECF. No.347). The Settlement represents a favorable result requiring Defendants to pay \$4,250,000.000 which will be apportioned, on a claims paid basis, among the nearly 600 class members after the deduction of attorneys’ fees and costs, and the aforementioned sanctions, thus providing real benefit to the Plaintiffs while avoiding the uncertainty and delay of further litigation. The Parties reached this arms-length compromise through multiple mediations and discussions over the life of this seven year case. The first mediation occurred on April 10, 2015 with the Hon. Philip Pro. The second mediation occurred on January 11, 2019 with the Hon. Bruce Meyerson (Ret.). The Parties respectfully submit that the terms of this settlement are fair and reasonable. Accordingly, the Settlement should be approved so that payments can be distributed and the case can be closed.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This action was initiated on July 27, 2012, and involves a Complaint for violations of the Fair Labor Standard Act (“FLSA”) by Defendants for automatically deducting thirty (30) minutes each day from its hourly employees’ pay for meal break times. Docket Entry ##1, 37. Declaration of Jon A. Tostrud in Support of Joint Motion for Approval of Collective Action Settlement Agreement (Tostrud Decl.) ¶8. Plaintiffs allege that these automatic deductions were made by UMC during the relevant time period irrespective of whether or not UMC’s hourly employees were able to take the breaks at issue. This policy applied to the named Plaintiffs and members of the collective action. Docket Entry ##1, 37. Plaintiffs also alleged UMC did not maintain proper time records reflecting

whether employees took meal breaks or worked through meal breaks. *Id.* Plaintiffs alleged that UMC, plainly aware of its own auto deduct policy, deliberately continued the policy as it reduced UMC's labor and payroll costs. *Id.* at ¶¶ 19-20.

In or around January, 2012, the U.S. Department of Labor ("DOL") began an investigation into UMC, focusing on the hospital's meal break practices and procedures over the prior two years. At the end of its investigation, the DOL concluded UMC automatically deducted 30 minutes for meal breaks from employees' pay even though a number of employees did not receive the *bona fide* uninterrupted meal breaks in violation of the FLSA. UMC disputes and disagrees with the DOL's conclusion. A few months after the filing of this action, UMC created and then implemented a formal mealtime policy that required employees to clock in and out for their meal periods.

After Judge Howard McKibben denied UMC's motion to dismiss Plaintiffs' initial complaint on November 14, 2012 [ECF. No. 33.], Plaintiffs filed an Amended Complaint in December 2012, [ECF. No. 37], adding three additional named Plaintiffs and repeating the allegations of FLSA and Nevada wage and hour law violations. Tostrud Decl. ¶9. UMC filed an Answer on January 2, 2013. [ECF. No. 42]. Tostrud Decl. ¶9.

On June 14, 2013, this Court granted Plaintiffs' motion to conditionally certify this case as an FLSA collective action under section 216(b) [ECF. No. 106]. Tostrud Decl. ¶10. Following posting of the Court-approved Notice, approximately 600 current and former employees joined the lawsuit as opt-in Plaintiffs.¹ *Id.*

On February 11, 2014, the Court ordered the appointment of a Special Master at the expense of UMC for the purpose of investigating perceived discovery abuses by UMC. [ECF. No. 146.] Tostrud Decl. ¶11. After months of intensive hearings and communications with both parties, on August 18, 2014, the Special Master issued his Report and Recommendation and Final Findings of

¹ This motion seeks approval for a final FLSA opt-in settlement group of 586 Claimants.

1 Fact and Conclusions of Law, which included, among other things, a recommendation of monetary
2 and evidentiary sanctions for UMC's willful and intentional discovery abuses. [ECF. No. 189.]
3 Tostrud Decl. ¶11. Based on the Special Master's findings, and inferences drawn from scores of
4 evidence that UMC was found to have improperly lost or destroyed, the Special Master
5 recommended that a default judgment be entered against UMC in favor of Plaintiffs. [*Id.* at 68-69.]
6 Tostrud Decl. ¶11.

7
8 UMC filed an objection to the Special Master's report on September 9, 2014. [ECF. No.
9 207]. Tostrud Decl. ¶11. Thereafter a flurry of briefing and eventual oral argument occurred
10 relating to the Special Master report.

11 Plaintiffs filed a Second Amended Complaint in February 2015 [ECF. No. 237], repeating
12 the prior FLSA allegations regarding the auto deduct policy, omitting any claim under Nevada
13 statutes, and adding state common law claims. Tostrud Decl. ¶12.

14
15 On April 10, 2015, the parties mediated this matter before the Hon. Phillip Pro (Ret.) in an
16 attempt to resolve the dispute. Tostrud Decl. ¶ 13. The mediation failed and the parties continued to
17 litigate the matter. *Id.*

18 In July 2015, Plaintiffs filed a Motion to Amend Complaint, seeking to name UMC's Chief
19 Human Resources Officer, John Espinoza, as a Defendant. [ECF. No. 249.] Tostrud Decl. ¶12.
20 This Court granted Plaintiffs' motion, [ECF. No. 255], and Plaintiffs filed their Third Amended
21 Complaint shortly thereafter. [ECF. No. 256.]

22 Defendants moved to dismiss the Third Amended Complaint for failure to state a claim.
23 [ECF. No. 259.] This Court dismissed Plaintiffs' FLSA claim with leave to amend because
24 Plaintiffs' allegations regarding overtime did not meet the standard recently announced in *Landers v.*
25 *Quality Communications, Inc.*, 771 F.3d 638 (9th Cir. 2014). [ECF. No. 267.]

26
27 Plaintiffs filed a Fourth Amended Complaint on August 25, 2016, [ECF. No. 268], alleging
28

one FLSA claim against Defendants UMC and Espinoza. Tostrud Decl. ¶14. Defendants moved to dismiss the Fourth Amended Complaint in October 2016. [ECF. No. 273.] This Court denied Defendants' motion, ruling Plaintiffs plausibly alleged the Defendants knew or should have known that employees were regularly missing meal breaks or having meal breaks interrupted but were still having 30 minutes deducted from their time automatically, without compensation, [ECF. No. 276 at 5-6]. The Court further held Plaintiffs adequately alleged Espinoza is an employer within the meaning of the FLSA. *Id.* at 9.

On August 9, 2018, Judge Leen entered a lengthy, detailed Order based on a *de novo* review that accepted and adopted the Special Master's recommendations in part and overruled them in part, specifically declining to enter case dispositive sanctions and instead imposing monetary sanctions and sanctioning Defendants by an instruction to the jury stating "the court has found UMC failed to comply with its legal duty to preserve discoverable information, failed to comply with its discovery obligations, and failed to comply with a number of the court's orders. Tostrud Decl. ¶15. The instruction will provide that these failures resulted in the loss or destruction of some ESI relevant to the parties' claims and defenses and responsive to plaintiffs' discovery requests, and that the jury may consider these findings with all other evidence in the case for whatever value it deems appropriate." [ECF. No. 308 at 100:2-7]. UMC did not object to or appeal Judge Leen's Order which included a detailed and substantive analysis of the applicable Ninth Circuit case law. On November 5, 2018, Judge Leen Ordered UMC to pay a fee and expense sanction in the amount of \$819,715.00.² Tostrud Decl. ¶ 16.

On January 11, 2019, the Parties participated in a private mediation with the Hon. Bruce Meyerson (Ret.) which resulted in this Settlement. Tostrud Decl. ¶17.

² Of this award, \$570,885.00 was awarded for attorneys' fees and \$248,830.00 was awarded for costs.

III. SUMMARY OF THE SETTLEMENT'S KEY PROVISIONS

The full terms of the Settlement are set forth in the Stipulation of Settlement Agreement and Release. (Ex. A.) The critical terms of the Settlement are summarized below.

The Settlement provides for the Defendants to pay a total sum of Four Million, Two Hundred and Fifty Thousand and 00/100 cents. (\$4,250,000.00) (the "Maximum Settlement Amount"). (Settlement Agreement, at 2.) This amount will be used, in part, for: (1) payment to Plaintiffs, including Class Representatives Service Awards, and Service Awards to individual Opt-in Plaintiffs who sat for depositions and responded to individual discovery; (2) payment to Plaintiffs' Counsel for attorneys' fees, expenses, and costs; (3) satisfaction of the Sanctions Order as entered by Judge Leen relating to attorney fees and costs; and (4) payment for Settlement Administrator's costs. (Settlement Agreement, at 2).

The Maximum Settlement Amount, less Class Counsels' attorney fees, Class Counsels' costs, Class Representatives Enhancement Awards, satisfaction of the Sanctions Order, and third-party Settlement Administrator's fees, shall be known as the "Maximum Total Claims Amount." Maximum Total Claims Amount will be distributed to Plaintiffs, whose individual payment will be entitled "Pro Rata Allocation," and will be calculated and distributed based on the following: (1) each Plaintiff's pay rate as of the date of filing of the Complaint; (2) number of weeks worked by each Plaintiff during the Relevant Statutory Period; and (3) whether Defendants required Plaintiffs to carry a pager and/or cell phone during his or her scheduled work shifts.

A. **Formula for Distribution of the Maximum Total Claims Amount to Plaintiffs**

Each Plaintiff will receive a proportionate share of the Maximum Total Claims Amount based on the number of weeks worked during the relevant Class Period multiplied by the Plaintiff's pay rate at the time of the filing of the initial complaint. Tostrud Decl. ¶20. There are 586 Plaintiffs who have affirmatively consented to join this case who worked a total of 78,095 weeks during the

relevant Class Period. In addition, the 153 Plaintiffs who were required by Defendants to carry and respond to their pager or cellphone during their scheduled shifts will receive a 1.25 multiplier to their Individual Claimant Award. *Id.* Based on the foregoing formula, the pager Claimants' average Pro Rata Allocation would be \$3,824.31. The non-pager Claimant's average Pro Rata Allocation would be \$3,276.70. This represents a significant percentage of the total amount Plaintiffs would have received had they prevailed at trial.

B. Enhancement Payment to the Named Plaintiffs and Deposed Plaintiffs

According to the Ninth Circuit, "...named plaintiffs ... are eligible for reasonable incentive payments. The district court must evaluate their awards individually, using 'relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class had benefitted from those actions, the amount of time and effort the plaintiff in pursuing the litigation and reasonable fears of workplace retaliation.'" *Staton v. Boeing Corp.*, 327 F.3d 938, 977 (9th Cir. 2003) [citations and internal alterations omitted].

Subject to the Court's approval, Plaintiffs' Counsel seeks approval from the Court for a \$10,000.00 award to each of the six Named Plaintiffs for their services, time, and efforts as Named Plaintiffs in this litigation ("Service Awards"). The requested Service Award is fair and reasonable because each Named Plaintiff was instrumental in this litigation and in achieving an extraordinary result for Plaintiffs in this collective action. Named Plaintiffs have invested a great deal of personal time and effort into the investigation, prosecution, and the settlement of the case, provided deposition testimony, responded to written discovery, and produced relevant documents, all of which is set forth in each of their declarations to be filed in conjunction with the motion for approval of collective action settlement and motion for award of attorneys' fees, litigation costs, and administration expenses.³ The Named Plaintiff Service Award shall be in addition to the share in

³ See Declarations of Named Plaintiffs Dan Small, Carolyn Small, William Curtin, Louise Collard,

which the Named Plaintiffs are otherwise entitled to under the Settlement Agreement and shall be payable from the Settlement Amount. (Settlement Agreement, at 2.)

In addition, Plaintiffs' Counsel seeks approval from the Court for a \$2,000 Service Award to each of the twenty Plaintiffs who were deposed and responded to individual written discovery requests in connection with this matter (the "Deposed Plaintiffs). These Service Awards shall be in addition to the share in which the Deposed Plaintiffs are otherwise entitled to under the Settlement Agreement and shall be payable from the Maximum Total Claims Amount. Like the Named Plaintiffs, these individuals were instrumental in this litigation and in achieving an extraordinary result for the Plaintiffs in this case.

Lastly, Plaintiffs' Counsel will submit for the Court's approval under separate motion a request to approve attorneys' fees and costs.

IV. ANALYSIS

A. **One-Step Approval Process Is Standard for FLSA Settlements**

In the Ninth Circuit and throughout the country, a one-step approval process is appropriate in FLSA opt-in settlements that do not include Rule 23 opt-out classes.⁴ Section 216(b) collective actions such as this do not implicate the same due process concerns as Rule 23 class actions because they require workers to affirmatively opt-in to the litigation. *Espenscheid v. DirectSat USA, LLC*, 705

David Cohen, and Lanette Lawrence, filed concurrently herewith.

⁴ See, e.g., *Yue Zhou v. Wang's Restaurant*, 2007 WL 2298046, *1 (N.D. Cal. 2007); *Hand v. Dionex Corp.*, 2007 WL 3383601, *1 (D. Ariz. 2007); *Besic v. Byline Bank, Inc.*, No. 15 Civ. 8003 (N.D. Ill. Oct. 26, 2015); *Prena v. BMO Fin. Corp.*, No. 15 Civ. 9175, 2015 WL 2344949, at 1 (N.D. Ill. May 15, 2015) ("One step is appropriate because this is an FLSA collective action, where collective members must affirmatively opt-in in order to be bound by the settlement (including the settlement's release provision)."); *Roberts v. Apple Sauce, Inc.*, No. 12 Civ. 830, 2014 WL 4804252 (N.D. Ind. Sept. 25, 2014); *Beatty v. Capital One Fin. Corp.*, No. 12 Civ. 434 (N.D. Ill. Dec. 13, 2012); see also *Bozak v. Fedex Ground Package Sys., Inc.*, No. 11 Civ. 738, 2014 WL 3778211 (D. Conn. July 31, 2014); *Dixon v. Zabka*, No. 11 Civ. 982, 2013 WL 2391473 (D. Conn. May 23, 2013); *Powell v. Lakeside Behavioral Healthcare, Inc.*, No. 11 Civ. 719, 2011 WL 5855516 (M.D. Fla. Nov. 22, 2011).

1 F.3d 770, 771 (7th Cir. 2013); *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529(2013)
 2 (“Rule 23 actions are fundamentally different from collective actions under the FLSA.”).Under the
 3 FLSA, “parties may elect to opt in but a failure to do so does not prevent them from bringing their
 4 own suits at a later date.” *McKenna v. Champion Int’l Corp.*, 747 F.2d 1211, 1213(8th Cir. 1984),
 5 abrogated on other grounds by *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165(1989).
 6

7 Accordingly, courts do not apply the exacting standards for approval of a class action
 8 settlement under Rule 23 to FLSA settlements. See, e.g., *Beckman v. KeyBank, N.A.*, 293 F.R.D.467,
 9 476 (S.D.N.Y. 2013); *Woods v. N.Y. Life Ins. Co.*, 686 F.2d 578, 579-80 (7th Cir. 1982) (due process
 10 concerns present in Rule 23 class action are not present in FLSA collective actions). There is no
 11 need to require that the settlement provide for opt-outs or objections where individuals are not part
 12 of the settlement unless they decide to participate. *Prena*, 2015 WL 2344949, at *1;*Woods*, 686 F.2d
 13 at 580.
 14

15 **B. Court Approval of FLSA Settlements**

16 FLSA claims may not be settled without approval of either the Secretary of Labor or a district
 17 court. *Seminianov. Xyris Enter., Inc.*, 602 Fed.Appx. 682,683 (9th Cir. 2015), *citing*, *Nidiv. Mal-*
 18 *Motels, Inc.* 723 F.3d 1304, 1306 (11th Cir. 2013); 29 U.S.C. § 216(c). While the Ninth Circuit has
 19 not established any particular criteria for determining whether an FLSA settlement should be
 20 approved, district courts within the circuit look to the Eleventh Circuit's opinion in *Lynn's Food*
 21 *Stores, Inc. v. U.S.*, 679 F.2d 1350 (11th Cir. 1982). *See, e.g., Gamble v. Boyd Gaming Corp.*, 2017
 22 WL 721244 at *4 (D. Nev. Feb. 23, 2017), *citing*, *McKeen-Chaplin v. Franklin Am. Mortg. Co.*,
 23 2012 WL 6629608, at *2 (N.D. Cal. Dec. 19, 2012); *Trinh v. JP Morgan Chase & Co.*, 2009 WL
 24 532556 at * 1 (S.D. Cal. March 3,2009); *Goudie v. Cable Commc 'ns, Inc.*, 2009 WL 88336 at * 1 (D.
 25 Or. Jan. 12,2009); *Hand v. Dionex Corp.*, 2007 WL 3383601, at * 1 (D. Ariz. Nov. 13,2007).
 26
 27

28 “When employees bring a private action for back wages under the FLSA, and present to the

district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness." *Lynn's Food Stores, Inc.*, 679 F.2d at 1353.⁵ A court should approve a fair and reasonable settlement if it was reached as a result of contested litigation to resolve a *bona fide* dispute between the parties. *Id.* at 1354 ("If a settlement in an employee FLSA suit does reflect a reasonable compromise over issues, such as FLSA coverage or computation of back wages, that are actually in dispute; we allow the district court to approve the settlement in order to promote the policy of encouraging a settlement of litigation.") Thus, a FLSA settlement should be approved when, as in this case, it is a fair and reasonable compromise reached as a result of contested litigation to resolve *bona fide* disputes between the parties.

C. The Proposed Settlement Is the Product of Highly Contested Litigation to Resolve *Bona Fide* Disputes Over the Availability and Amount of Overtime Wages

Plaintiffs alleged that Defendants violated the FLSA because they failed to pay Plaintiffs for missed meal breaks and, therefore, uniformly failed to pay them for all hours worked in excess of 40 hours per workweek. Defendant denies Plaintiffs' allegations and maintains that Plaintiffs were properly compensated, and were fully paid as required by federal law. If Plaintiffs' allegations were all proven and found to be correct, Defendants would be faced with the prospect of a significant monetary verdict in favor of Plaintiffs, as well as the obligation to pay their own litigation fees and costs, and the litigation fees and costs of Plaintiffs' counsel. If Defendants' arguments were accepted and found to be correct, then Plaintiffs faced a potential dismissal of their claims and potentially zero recovery. Accordingly, the Court should readily conclude that *bona fide* disputes between the Parties

⁵ The standard for approval of an FLSA settlement is lower than for a FRCP Rule 23 settlement because an FLSA settlement does not implicate the same due process concerns as does a Rule 23 settlement. See, e.g., *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 11129, 1136 (D. Nev. 1999) ("The §216(b) requirement that plaintiffs consent to the suit serves essentially the same due process concerns that certification serves in a Rule 23 action."). Rule 23's fairness factors are, however, instructive and relevant. See, e.g., *Gamble v. Boyd Gaming Corp.*, 2017 WL 721244 at *4.

1 existed over FLSA coverage.

2 Further, there is no question that the proposed Settlement is the product of contested
 3 litigation. This litigation has been hotly contested for seven years and involved substantial briefing,
 4 significant discovery, dozens of hearings, numerous complexities and two mediations. Tostrud
 5 Decl. ¶ 17. In their Complaint, Plaintiffs made detailed, factual allegations describing Defendants'
 6 allegedly unlawful compensation practices. The Parties conducted extensive formal discovery and
 7 factual investigations regarding the issues raised in Plaintiffs' Complaint. Plaintiffs' counsel
 8 reviewed hundreds of thousands of pages of documents; analyzed compensation data and records;
 9 deposited numerous individuals; defended 20 Claimant depositions; participated in a 9 month Special
 10 Master discovery dispute; engaged in significant motion practice, including motions to dismiss,
 11 conditionally certify, and to compel discovery, in addition to the numerous Special Master hearings;
 12 drafting and filing a motion for partial summary judgment; and conducting a thorough investigation.
 13 Tostrud Decl. ¶ 17. Similarly, Defendants engaged in analysis of their own documents and records
 14 to evaluate the veracity of Plaintiffs' claims and otherwise conducted their own extensive
 15 investigation. In addition to their factual investigations, the Parties also undertook considerable legal
 16 analysis of the various issues implicated' in this case, including fully analyzing and evaluating the
 17 issues pertaining to collective action certification. Accordingly, the Court should readily conclude
 18 that the proposed Settlement was the product of contested litigation.

21
 22 **D. The Settlement Reflects a Fair and Reasonable Resolution of the FLSA Dispute**

23 The non-exhaustive list of factors courts typically consider in evaluating a proposed
 24 settlement for fairness include: (1) the strength of plaintiffs' case; (2) the risk, expense, complexity
 25 and likely duration of further litigation; (3) the extent of the discovery completed; (4) the stage of the
 26 proceedings; and (5) the experience and views of counsel. *Trinh v. JP Morgan Chase & Co.*, 2009
 27 WL 532556 at * 1, *citing*, *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370,1375 (9th Cir. 1993). Here,
 28

1 the Parties agree that application of these factors confirms that their proposed Settlement constitutes
2 a fair and reasonable compromise of their *bona fide* disputes. Tostrud Decl. ¶¶ 19, 23.

3 The Settlement in this lawsuit resulted only after significant negotiations with skilled
4 mediators. Prior to the Settlement, the Parties, who at all times have been fully and adequately
5 represented by counsel, had full opportunity to analyze the pertinent factual and legal issues and
6 assess the strengths and weaknesses of the claims and defenses at issue. The Parties also completed
7 significant discovery. The arms-length negotiation by experienced counsel before a qualified
8 mediator ultimately allowed the Parties to bridge the significant gap between the Parties' settlement
9 positions and obtain the resolution described above. Tostrud Decl. ¶ 18. Under these circumstances,
10 a presumption of fairness should attach to the proposed Settlement. *See Lynn's Food Stores, Inc.*,
11 679 F.2d at 1354 (recognizing that courts rely on the adversary nature of a litigated FLSA case
12 resulting in settlement as indicia of fairness).
13

14 Moreover, the Settlement provides meaningful relief to Plaintiffs and eliminates the inherent
15 risks both sides would bear if this complex litigation continued to resolution on the merits. Tostrud
16 Decl. ¶21. Many complex issues of fact and law remain unanswered and would have to be resolved
17 at, or before, trial. Any trial would be lengthy, costly, and complex, likely involving a veritable
18 "battle of experts" opining on technological issues and complicated mathematical formulas used to
19 determine whether the amount of any hours worked yielded violations of the FLSA's overtime
20 requirements for Plaintiffs during each week of employment during the relevant time period.
21 Regardless of the outcome at trial, post-judgment appeals would be inevitable. Accordingly, the
22 complexity and prospective expense and duration of litigation weigh in favor of approving the
23 proposed Settlement.
24

25 As outlined above, the Parties disagree about the merits of Plaintiffs' claims and the viability of
26 Defendants' various defenses. If the litigation had continued, Plaintiffs would have faced many
27
28

1 obstacles, including decertification of the collective action under Section 216(b) of the FLSA,
 2 entitlement to overtime, amount of overtime owed, applicable statute of limitations, and calculation
 3 of overtime. Plaintiffs could also lose up to 50% of the total value of their claims if Defendants
 4 successfully proved its good faith defense against liquidated damages. Additionally, although the
 5 range of potential recovery at trial would possibly have been greater, it is equally possible the
 6 potential recovery would have been less. Consequently, this Settlement provides a certainty of result
 7 and value now, as opposed to years from now. Thus, the Settlement avoids expenditures of resources
 8 for all parties and the Court, and provides "significant benefit that [plaintiffs] would not receive if
 9 the case proceeded—certain and prompt relief." *Barbosa v. Cargill Meat Sol. Corp.*, 297 F.R.D.
 10 431, 446 (E.D. Cal. 2013).

12 Finally, the proposed distribution from the Maximum Total Claims Amount to Plaintiffs is
 13 fair and equitable. Tostrud Decl. ¶¶ 19, 23. The Pro Rata Allocation amounts are tailored to each of
 14 the Plaintiff's actual damages and will represent a *pro rata* share of the Maximum Total Claims
 15 Amount based upon (1) each Plaintiff's tenure with Defendants, their individual pay rates, and
 16 whether Plaintiffs were required by Defendants to carry a pager or cellphone during their scheduled
 17 work shifts. Tostrud Decl. ¶ 20. The average payment to a pager Plaintiffs will be \$3,824.31. The
 18 average payment to a non-pager Plaintiffs will be \$3,276.70. These averages fall well within the
 19 range of possible recovery for both of these groups. Plaintiffs allege that the substantial discovery
 20 of dozens of Plaintiffs in this case supports the claim that different Plaintiffs missed different
 21 numbers of meal breaks and for varying and different reasons. Thus, proving the actual number of
 22 actual missed or interrupted meal breaks for these Plaintiffs would be challenging. Conversely,
 23 Plaintiffs allege that the discovery and relevant case law provided more substantiation and support
 24 for the allegation that pager Plaintiffs missed or had a meal break interrupted by the pager.
 25 Therefore, the pager Plaintiffs are receiving a larger share of the Net Settlement Fund because the
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1 purported discovery and relevant case law makes the number of missed or interrupted meal breaks
2 greater and more ascertainable.

3 The result achieved in this case is excellent for the entire class of represented Plaintiffs.
4 Daniel Small, Carolyn Small, William Curtin, David Cohen, Lanette Lawrence, and Louise Collard,
5 individually and on behalf of all other similarly situated employees, filed this suit seeking monetary
6 compensation for FLSA violations related to uncompensated meal breaks. This is precisely what has
7 been accomplished. In return for the release of all claims asserted in this action, Defendants will pay
8 a 7-figure amount to be disbursed among the Plaintiffs. Moreover, as a result of this case, UMC has
9 implemented a new timekeeping policy and procedure to avoid the allegation that its employees are
10 not properly compensated for missed meal breaks.

11 Litigation always involves a certain amount of risk, however, with collective actions, that risk
12 is multiplied due to the procedural complexities inherent in getting the collective certified, settling
13 on behalf of a large number of people, executing at the notice and opt-in stage, avoiding
14 decertification, and administering the claims accordingly.

15 This case was particularly risky as it involved a large class that Defendants allege Plaintiffs
16 would have trouble to sustain because of alleged distinctions between each individual Plaintiff's job
17 function and departmental management structure. Defendants allege that, as a result of these
18 distinctions, an individualized analysis is required and decertification would be appropriate.

19 Thus, it is apparent that Plaintiffs and counsel took immense risks by filing this case as a
20 collective action and taking it forward as a conditionally certified class, rather than as individualized
21 claims. Tostrud Decl. ¶ 21.

22 Plaintiffs' Counsel has years of experience in litigating employment actions, as well as class
23 actions, including on a national scale. Through careful investigation, scrutiny, and examination of
24 Plaintiffs' paystubs, as well as an investigation into the working conditions of those similarly
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1 situated, Plaintiffs' counsel was able to uncover a conditionally certified class involving one of the
2 state of Nevada's largest public health care facilities. Tostrud Decl. ¶ 17. Absent Plaintiffs'
3 Counsel's skill and diligence, this conditionally certified class case may not have been uncovered.

4 Plaintiffs were also benefited by counsel's knowledge regarding collective FLSA actions as
5 counsel was able to achieve preliminary certification despite Defendants' strong opposition.
6

7 Finally, as a result of Counsel's efforts, Plaintiffs will receive actual, real monetary
8 compensation. Tostrud Decl. ¶ 19. What is more, though, is that all of UMC's employees
9 benefitted from this action because of UMC's change in its timekeeping policy and practices which
10 are now designed to avoid the allegation that its employees are not properly compensated under the
11 FLSA.

12 **V. CONCLUSION**

13 **WHEREFORE, for the** foregoing reasons, the parties respectfully request that the Court
14 enter an order approving the Settlement and dismissing Named Plaintiffs' complaint with prejudice.
15 Attached hereto as Exhibit B is a copy of a Proposed Order.
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1 DATED 13th day of May 2019.

DATED this 13th day of May, 2019.

2 By: /s/ Marc L. Godino

By: /s/ Robert W. Freeman

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PROOF OF SERVICE BY ELECTRONIC POSTING

I, the undersigned say:

I am not a party to the above case, and am over eighteen years old. On May 13, 2019, I served true and correct copies of the foregoing document, by posting the document electronically to the ECF website of the United States District Court for the District of Nevada, for receipt electronically by the parties listed on the Court's Service List.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 13, 2019, at Los Angeles, California.

s/ Marc L. Godino
Marc L. Godino